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DEPARTMENT OF STATE
THE LEGAL ADVISER

January 30, 1959

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TO : EUR - Mr. Kohler
FROM : L/EUR - Mr. Kearney R.D.T.C.
SUBJECT: Soviet proposal for a German Peace Treaty

Even a casual examination of the draft German peace treaty which the Soviet Union submitted with its note of January 10, 1959 establishes that the document has not been drafted in a workable manner. It is not possible to say whether this malfunction derives from a deliberate Soviet attempt to confront the Western Powers with a document so inoperable as to ensure its inevitable rejection or whether the failure stems from a rather callous disregard of legal requirements in the pressure of cutting and pasting previous treaty efforts into a new propaganda mold.

Whatever the reason, the end result of the Soviet effort displays a degree of ineptitude so great that it provides some substance for believing the errors must have been intentional. These errors stem from the Soviet concept of having a peace treaty with Germany, but a Germany which does not exist. Article 2 of the Soviet draft sets forth the thesis of this unique development in the age-old art of treaty drafting:

"Article 2. Pending the unification of Germany in one or another form the expression 'Germany' in the present treaty will be understood to include the two existing German States - the German Democratic Republic and the Federal Republic of Germany, and all the rights and obligations of Germany, foreseen in the treaty, will relate to the German Democratic Republic, as well as to the Federal Republic of Germany."

There would, of course, be nothing at all strange in a proposal that there be a peace treaty with two states rather than one, as successors to a former belligerent state, although, because of the necessarily differing situations in the two successor states, the less complicated approach would be to have separate peace treaties. Nevertheless it would not be unduly difficult to work out an agreement which made clear the rights and obligations of each successor. This, however, is precisely what the Soviets have not done. Instead, they have put forward a proposal in which the Federal Republic of Germany and the Soviet puppet regime, the so-called German Democratic Republic, are to assume all rights and obligations of a peace treaty although they are to remain separate entities.

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The absurdity of this proposal becomes patent upon consideration of the operative clauses of the Soviet proposal. Thus, Article 3 provides:

"The Allied and Associated States recognize the full sovereignty of the German people over Germany, including its territorial waters and air space."

If the German people have full sovereignty over Germany, then what does the Federal Republic of Germany have within its territory, and the German Democratic Republic purportedly have in its? Does this clause, for example, require that in international relations diplomatic intercourse must be maintained by representatives of the German people rather than by representatives of the "two existing German states"? This would require as a corollary that all agreements be made with "Germany" despite the complete absence of any practical means of making such agreements.

The specific reference to German territorial waters in Article 3 also raises some peculiarly pointless problems. If territorial waters are subject to the full sovereignty of the German people, then does action by either of the "existing German states" in connection with its territorial waters amount to anything other than a nullity unless agreed by both states? Or, with regard to air space, likewise specifically mentioned, could one of the states grant landing rights in its territory in the absence of approval by the other state? Or could one state grant landing rights in the other? The Soviet proposal affords no answer to these questions or to any of the myriad of other questions raised by the provisions in Article 3.

The complete carelessness of the Soviet approach to this treaty is highlighted in Article 4 which provides, among a list of relatively resounding phrases, that the Allied and Associated Powers will respect the "territorial integrity of Germany". Having displayed utter disrespect for that integrity by refusing to establish Germany as an integral unit prior to the conclusion of a peace treaty, and having produced a treaty which can only serve to perpetuate the territorial division of Germany, to then sanctimoniously write into the same treaty a clause regarding Soviet respect for Germany's territorial integrity is a piece of hypocrisy which would certainly brighten the day of a Uriah Heep. The finishing touch is then added by requiring that Germany, in relations with other countries, respect its own territorial integrity which it doesn't have and, if the Soviet attitude reflected in the draft peace treaty is to prevail, is unlikely ever to achieve.

Article 4 also places upon Germany the obligation to solve international disputes by peaceful means, and forbids it to extend any aid or support to another state or group of states violating international peace and security. The application of this requirement in actual practice could be productive of results surprising to its drafters. If, for example, there should be a revolt in a Communist satellite, such as Hungary, which the Soviet military forces crush with brutality and contemptuous disregard for "international peace and security", and the so-called German Democratic Republic assists this Soviet repression in any way, would not the Federal

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Republic of Germany be under an obligation to prevent such support? The Federal Republic might well be required, in view of the unconditional nature of the obligation which is placed upon "Germany" not to extend aid or support in such circumstances, to prevent the East German regime, by force of arms if necessary, from extending such aid. Thus, this Article, in view of the conditions under which it is likely to be enforced, could well serve as a built-in threat to international peace and security rather than a safeguard against violations thereof.

Somewhat the same problem is raised by the provision in Article 5 that Germany will not take part in a military alliance unless the United States, United Kingdom, France, and the Soviet Union are members of the alliance. If one part of "Germany" should join, de jure or de facto, an alliance from which one or more of the four powers are absent, is not the other part of "Germany" under an obligation to see that such participation is terminated? And, if it is under such obligation, then the ominous question must be faced -- how is the obligation to be enforced?

Article 7 requires the Allied and Associated Powers to support the application of "Germany" for acceptance as a member of the United Nations Organization. The carrying out of this requirement raises some interesting, if futile, speculations. Article 4 of the Charter of the United Nations provides that membership is open to "... peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." There is, of course, no "state" of Germany under the Soviet proposal. In fact, Article 2 specifically refers to "two existing German states". It would not appear that Germany could qualify for membership under Article 4 of the Charter in view of the schizophrenic status envisaged by the Soviets. But even if this problem were overlooked, how would the Organization dealing with the inchoate concept of such a Germany be able to judge that it would be able and willing to carry out the obligations of the Charter, composed as it would be of two independent entities with the most divergent views and without any machinery for reconciling those views? The proposal is absurd, patently absurd, an absurdity matched only by the temerity of the Soviets in presenting such a still-born concept for serious consideration.

The Soviet draft treaty contains, all told, some forty-eight articles, and in one article after another the same series of problems arises. Upon what entity does a particular obligation rest? To what entity does a particular right accrue? How are rights and obligations to be carried out? How are violations thereof to be treated? It would be an act of complete redundancy to go through the entire draft specifying the exact manner in which this ill-conceived Soviet proposal distorts and obscures the execution of the articles. The completely obvious problems stemming from the first few articles which have been discussed afford ample illustration of the point that this treaty proposal is, in fact if not in intention, unworkable.

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It could be argued from the Soviet point of view that the difficulties which have just been raised are immaterial because the treaty envisages the reunification of Germany. There would at the most be a short period, somewhat in the nature of an interregnum, before the "Germany" of the draft treaty becomes the State of Germany. In fact, in Article 22 all the signatories to the treaty are required to genuflect to this concept by agreeing that they "regard the present treaty as an important contribution to the matter of the unification of Germany ...". The jaundiced might inquire if this Soviet proposal is such an important contribution to German reunification, why the Soviets, in the very next article of their draft, consider it necessary to extract from the Federal Republic and the East German regime, a solemn commitment that they will never "resort to force or to the threat of the use of force for the achievement of the unification of Germany ...". The reasonable conclusion would seem to be that the Soviets are not prepared to be taken in by their own propaganda.

The treaty, of course, contributes nothing positive to the reunification of Germany and, on the debit side, constitutes a major deterrence to reunification. To list but two such hindrances, in the first place it sanctifies the division of Germany by requiring widespread international recognition of the division of Germany into two states; and in the second place these two states are then saddled with a long series of duties and obligations without any definition of the locus of responsibility, which will necessarily result in disputes between themselves. If any credence were to be given the Soviet chest-thumping about what a major contribution to German reunification this Soviet draft is, it could only be on the thesis that the two states recognized by the treaty will be forced into such a state of chaos in connection with the treaty obligations that the one way out will be reunification.

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